STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

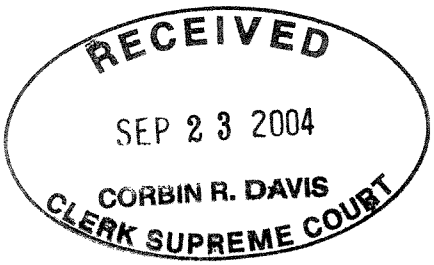
JEROME KNIGHT,

Defendant-Appellant.
_____/

Supreme Court No.
Court of Appeals No. 231845
Lower Court No. 99-2073-02

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL (AFTER SUPREME COURT REMAND)

PROOF OF SERVICE



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v

JEROME KNIGHT,

Defendant-Appellant.
_____/

NOTICE OF HEARING

TO: Wayne County Prosecutor's Office
Frank Murphy Hall of Justice
Appellate Division
1441 St. Antoine - 12th Floor
Detroit, Michigan 48226

PLEASE TAKE NOTICE that the attached Application For Leave To Appeal will be brought on for hearing in the Michigan Supreme Court, in Lansing, Michigan, on **Tuesday, the 2nd day of December, 2003, at 9:00 a.m.** of said day.

Respectfully submitted,

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Dated: November 10, 2003.

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JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant was convicted by a jury of first-degree murder, MCL § 750.316, and sentenced to life imprisonment. Defendant appealed to the Court of Appeals by right, and in an Unpublished *per curiam* Opinion dated October 15, 2002, the Court of Appeals affirmed the Defendant's conviction.

Defendant appealed to this Court and asked this Court to grant Leave to Appeal. On appeal, this Court issued an Order vacating the portion of the judgment of the Court of Appeals concerning defendant's peremptory challenge issue under *Batson v Kentucky*, 476 US 79, 106 S Ct 1712, 90 L Ed 2d 69 (1986) and remanded the matter to the Court of Appeals for reconsideration of that issue. (Order of the Supreme Court, Docket No. 122852).

On October 7, 2003, the Court of Appeals again affirmed the Defendant's conviction in an Unpublished *per curiam* Opinion. Accordingly, Defendant is again appealing to this Court and asking this Court to grant Leave to Appeal and reverse the judgment of the Court of Appeals, or to peremptorily reverse the judgment of the Court of Appeals.

QUESTION FOR REVIEW

DID THE COURT OF APPEALS MISAPPLY THE RECORD AND THE LAW WHEN IT HELD THAT THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING A *BATSON* VIOLATION BASED ON THE PROSECUTOR'S FAILURE TO GIVE SUFFICIENT "RACE NEUTRAL" REASONS FOR EXCLUDING TWO OF THE MINORITY JURORS FROM THE JURY PANEL WITH PEREMPTORY CHALLENGES?

Defendant maintains that the judgment of the Court of Appeals is clearly erroneous and will cause material injustice. In addition, this issue involve principles of major significance to this State's jurisprudence.

CONCISE STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Defendant Jerome Knight and codefendant Gregory Rice were charged with first-degree premeditated murder, MCL 750.316. Mr. Knight and Mr. Rice were tried jointly before the Honorable Cynthia Gray Hathaway in Wayne County Circuit Court.

The prosecutor argued to the jury that her theory was that Jerome Knight's motive to kill Yahnica Hill was their stormy relationship and ongoing dispute over visitation of their son, Jaylin Knight. Mr. Knight was a barber and knew Gregory Rice as one of his customers. He paid Rice to kill Hill by bonding Rice out of jail. (T, Vol IV, pp 49-50, 54-56; Vol XIII, pp 20-21, 37-40).[1] The prosecutor argued that Gregory Rice had a motive to do the shooting for Jerome Knight because Rice was poor and needed the money to be bonded out of jail. (T, Vol XIII, pp 21-23).

Jerome Knight's defense was that he had nothing to do with the killing. When Yahnica Hill repeatedly violated the court order for Knight to visit their son, Knight followed the law and filed complaints with the police. (T, Vol XIII, p 76). Christopher Bennett was a possible culprit: he was violent and had previously broken into Hill's house and attacked her. However, the police had focused on Mr. Knight from the beginning and did not investigate anyone else even though no physical evidence ever connected Knight with the killing. (T Vol IV, pp 65-66; Vol XIII, pp, p 78).

Prior to trial, defense counsel for codefendant Gregory Rice objected on hearsay grounds to

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Vol I refers to *voir dire* that was conducted on July 26, 1999; Vol II refers to *voir dire* that was conducted on July 27, 1999; Vol III refers to *voir dire* that was conducted on July 28, 1999; Vol IV refers to testimony taken on July 29 1999; Vol V refers to testimony taken on August 2, 1999; Vol VI refers to testimony taken on August 3, 1999; Vol VII refers to testimony taken on August 4, 1999; Vol VIII refers to testimony taken on August 5, 1999; Vol IX refers to testimony taken on August 9, 1999; Vol X refers to testimony taken on August 11, 1999; Vol XI refers to testimony taken on August 12, 1999; Vol XII refers to testimony taken on August 13, 1999; Vol XIII refers to closing arguments and instructions, which occurred on August 19, 1999.

admission of Rice's statements to Rodney Coleman, including that Rice told Coleman that he shot a girl, and that Coleman told Stephanie Harris, his aunt, about what had happened. (M, 7/21/99, pp 39-45, 48-52; M, 7/22/99, pp 3-16). The Circuit Judge admitted Rice's admission to Coleman of shooting a girl and the judge said, "I don't have any problems with that statement, that I shot a girl." (M, 7/21/99, p 41). The prosecutor argued that Rice's incriminating statements were admissions against his penal interest and admissions by a party opponent, including by a coconspirator (M, 7/21/99, p 42).

The day after the argument on the hearsay motion, the trial judge again said she was admitting the alleged admission by Gregory Rice to Rodney Coleman that Rice had killed a girl but said she was suppressing the statement from Coleman to Stephanie Harris, his aunt. (M, 7/21/99, pp 3-16). "The alleged admissions by Rice to Coleman will be admitted into evidence." (M, 7/21/99, p 4). However, the judge said "there's no problem" with Stephanie Harris testifying that "Mr. Coleman [told] you something that caused you to do something," i.e., go to the police. (M, 7/21/99, p 11). Mr. Rice's counsel renewed his objection concerning Harris, stating, "what they're now going to try to do is get the substance of the material in without actually stating what it is, through the back door. ... [W]e have the substance of the hearsay getting in anyhow." (M, 7/21/99, p 12). The defense objections to the hearsay were renewed during trial and again denied. (T, Vol IV, pp 82-87; T, Vol IX, pp 36-40; T, Vol XIII, pp 84-85).

At trial, Clifford Fuller testified about finding Yahnica Hill's car at a street corner as he was driving to work early in the morning of Tuesday, November 24, 1998. At about 6:15 in the morning Mr. Fuller saw Hill's car at the corner of Freud and Emerson, heading north on Emerson toward Jefferson. The driver's door was open, the headlights were on, and the car was running. (T, Vol IV,

pp 92-98, 115). Mr. Fuller saw Yahnica Hill's body about twenty feet from the car door and lying face down in the street. (T, Vol IV, pp 99, 114).

Various police officers testified that three nine-millimeter shell casings and one bullet were found at the shooting scene. One casing was on the ground near the driver's door, a second was on the back seat, and a third was on the rear floor. A fired bullet was found lying on the front passenger seat. (T Vol IV, pp 144-145; Vol V, p 11; Vol VII, pp 78-79, 90-91, 94-95, 104). The angle of a bullet path through the seat and into the passenger door was consistent with the shot having been fired through the driver's window while Yahnica Hill was sitting in the driver's seat. (T, Vol VII, pp 93, 138-139). The murder weapon was never found. (T, Vol VIII, p 67). Ms. Hill's purse and book bag were on the car seat and looked untouched. (T, Vol IV, p 147; Vol V, p 12). The only fingerprints found on her car were hers. (T, Vol VII, p 86; Vol VIII, p 30). There was damage or a scuff mark on the side of her car, but it was probably old damage. (T Vol IV, p 157; Vol V, pp 18-19; Vol VII, pp 71, 82-83). The police investigator in charge of the case admitted that there was no physical evidence tying Gregory Rice or Jerome Knight to the killing of Yahnica Hill. (T, Vol VIII, pp 68, 107, 127-128).

Dr. John Somerset, the pathologist, testified that Yahnika Hill's body had two fatal gunshot wounds through her chest and a gunshot wound through each palm. The wounds through the palms were consistent with defensive wounds from Hill having put her hands up in front of her. (T, Vol VI, pp 77-82). She had abrasions on her knees and face that were consistent with a terminal fall after she had been shot. (T, Vol VI, pp 83-84, 121). From the trajectory of the bullets through her body, there was no way to know whether she had been shot while sitting in her car or standing outside it, but after being shot it was possible for her to move the twenty feet from her car before collapsing at

the spot where her body was found in the street. (T, Vol VI, pp 98, 106, 124-125).

Parneisha Jerry stated that she was Yahnica Hill's best friend. (T, Vol V, p 23). She knew that after Hill and Christopher Bennett broke up in 1996 Hill and Bennett remained friends and still saw each other, such as going out for dinner. (T, Vol V, pp 26-29). Yahnica Hill's relationship with Jerome Knight broke up early in 1998. (T, Vol V, pp 25, 30). On November 22 Hill held a birthday party for her son, Christopher Bennett Jr., but did not invite Knight. (T, Vol V, p 31). Later that night Yahnica Hill called Ms. Jerry and over the telephone played her a voice-mail message of Jerome Knight saying Hill would not let Knight see Jaylin for his birthday and saying that he hated her and would kill her. (T, Vol V, pp 37-39, 44, 94-96). The next evening, November 23, Hill called Jerry again and played her a message mocking her and laughing at her and saying Hill would not see Jaylin again. (T, Vol V, pp 40-48, 51-52, 75).

Parneisha Jerry acknowledged that Jaylin Knight did not call Christopher Bennett his father and related to Jerome Knight as his father. (T, Vol V, pp 55-56). Yahnica Hill had originally told Christopher Bennett that he might be the father and fought with Mr. Bennett about custody, but then she told Jerome Knight that he was the father. (T, Vol V, pp 65, 88-90). Ms. Hill never legally changed the baby's name from Christopher Bennett, but used Jaylin Knight as the name. (T, Vol V, p 64). Under the court visitation order, Jerome Knight had the right to have Jaylin from Sunday to Tuesday. (T, Vol V, p 66). Ms. Hill had obtained a Personal Protection Order (PPO) against Mr. Knight in July of 1998, but the order was later dismissed. (T, Vol V, pp 70-71).

Eduard Petty said that he was on his way to work with John Hill, Yahnica's father, at about 5:00 p.m. on November 23 when Yahnica phoned Mr. Hill to say that his grandson had been kidnapped. (T, Vol V, pp 117-118). John Hill and Eduard Petty met Yahnica at a gas station near

Jerome Knight's house, where she told them that Knight had taken her son without permission, and "she was hysterical, she was very upset." (T, Vol V, p 120). They called for Detroit police officers, including John Hill's brother Sean, to go to Knight's house. Two uniformed officers unrelated to the Hills went to the house. After talking to Jerome Knight the officers told the Hills that Knight "had proper papers to have the child, he wasn't kidnapped, and we could not stand in front of Jerome's house." (T, Vol V, p 125). Yahnica Hill "got further upset. ... She was screaming." (T, Vol V, p 126). A while later, at about 8:00 p.m., Jerome Knight drove away from the house. As Knight drove by them he leaned toward the passenger side of his car, and Mr. Petty heard him say, "I'm going to kill you, bitch." (T, Vol V, pp 130-131).

Sean Hill said that his niece Yahnica had claimed that Jerome Knight kidnapped her baby from the day-care center. (T, Vol V, p 186). At Knight's duplex the two uniformed police officers showed Knight's visitation papers to Sean Hill and refused to intervene further. (T, Vol V, pp 167, 173). Yahnica Hill "didn't want to accept it but she did. ... She was very upset." (T, Vol V, p 167). Officer Hill said that when Yahnica yelled at Knight to give her baby back he responded, "you never going to get your baby back." (T, Vol V, p 172).

John Hill, Yahnica's father, said that his grandson's birth certificate had listed Christopher Bennett as the father and that the baby had originally been named Christopher Bennett Jr. Yahnica Hill later admitted that Jerome Knight was the father, and the baby was then called Jaylin Knight. (T, Vol VI, pp 13, 56-57, 66-67). Yahnica Hill and Jerome Knight broke up in June or July of 1998 after Knight beat her up, and Yahnica came to live with her father. (T, Vol VI, pp 11, 15-19). Mr. Hill never heard Mr. Knight threaten Yahnica. (T, Vol VI, p 66).

Christopher Bennett testified for the prosecution that Yahnica Hill was his former girlfriend,

but that at the time of her death they were "Just good friends." (T, Vol VII, p 10). When Hill's son was born in November of 1995 she named him Christopher Bennett Jr. She told Mr. Bennett that the baby was his, and he indeed thought the baby was his until Hill later told him otherwise. (T, Vol VII, pp 12, 33). She told him in December of 1996 when they were still boyfriend and girlfriend. They fought and broke up, and she got a PPO against Bennett. (T, Vol VII, pp 14-15, 52-54; Vol XI, p 91). He admitted to breaking her car window, but denied breaking into her house or beating her up. (T, Vol VII, p 56). Later, in the presence of Jerome Knight, she told Mr. Bennett that Knight was the father. (T, Vol VII, pp 13-18, 34).

Christopher Bennett denied having anything to do with Yahnica Hill's death. (T, Vol VII, pp 28-29, 60). He testified that at the time of her death he was involved with Trina Abner, but would still talk frequently with Yahnica Hill and would occasionally go out with her. (T, Vol VII, pp 18-19). Mr. Bennett said that on the night of her death, November 23-24, Yahnica Hill had called him three times. At 11:30 p.m. on Monday, the 23rd, they spoke and she was upset. (T, Vol VII, pp 22-24, 29-30, 60). At 1:30 a.m. on Tuesday, the 24th, she paged him while he was at Trina Abner's house but Hill and Bennett did not talk. (T, Vol VII, pp 24, 30). At 6:15 that morning while he was still at Abner's house, she paged him again with the number 911, but they again did not talk. (T, Vol VII, pp 25-26, 31). Later that day he learned that Yahnica Hill had died. (T, Vol VII, pp 26-27).

Stephanie Harris, Rodney Coleman's aunt, testified that she knew Gregory Rice from Rice visiting Coleman. (T, Vol VIII, pp 9-10). On November 26, 1998, i.e., two days after Yahnica Hill's death, Rodney Coleman came to Stephanie Harris's house and "was very agitated." (T, Vol VIII, p 10). After Coleman told her what was bothering him, she learned in December what happened to Yahnica Hill and told her boyfriend, Gerald Lewis, what Coleman told her. Mr. Lewis and John Hill,

Yahnica's father were best friends. In addition to telling Gerald Lewis, Ms. Harris also told the police what Coleman told her. (T, Vol VIII, pp 11-13). In February of 1999 Jerome Knight twice came by Stephanie Harris's house and asked to see Rodney Coleman, but she told Knight that Coleman was not at home "For my nephew's safety," even though Coleman was home during one of those two times. (T, Vol VIII, pp 13-15).

Marlynda Mattison, Rodney Coleman's girlfriend testified that in the afternoon of October 13, 1998, Coleman and Jerome Knight, whom she had not previously known, came to her house. (T, Vol VIII, pp 143-145, 178). They drove Knight's little boy to Yahnica Hill's house and dropped him off. (T, Vol VIII, pp 145-149). Mr. Knight told Ms. Mattison that he did not like Hill and that "he wanted his child real bad." (T, Vol VIII, p 148).

Marlynda Mattison went on to say that she, Rodney Coleman, and Jerome Knight drove to 1300 Beaubien, police headquarters, to bond out Gregory Rice. Mr. Knight gave Ms. Mattison $700, which she took inside, but it turned out not to be enough for bond. (T, Vol VIII, pp 150-152). Jerome Knight had left Mattison and Coleman by that point, so they called Knight at his house to tell him they needed $72 or $74 more dollars. (T, Vol VIII, 152-154, 167). Mr. Knight and his girlfriend Nikki came to the police department with the additional money, which Mattison and Nikki used to bond out Gregory Rice. (T, Vol VIII, p 155). Ms. Mattison stated that after Mr. Rice was released on bond he was homeless. (T, Vol VIII, p 179). Sometimes he slept on Mattison's porch or couch and sometimes he slept in his car, but did not return to live at his grandmother's house where he previously had been living. (T, Vol VIII, pp 181-182). On the night after Yahnica Hill's death, Rodney Coleman told Marlynda Mattison that Gregory Rice admitted killing Hill. (T, Vol VIII, pp 186, 195). Mr. Rice and Ms. Mattison subsequently had a falling out when Rice tried to borrow

money from her. (T, Vol VIII, p 188).

Rodney Coleman testified that he knew Jerome Knight and Gregory Rice, who was also called Mickey, from the barber shop on the west side of Detroit where Knight worked. (T, Vol IX, pp 7-8). Mr. Coleman acknowledged that his nickname was "Redrum," i.e, "Murder" spelled backwards, but claimed that he had stopped using the nickname long before the killing of Yahnica Hill. (T, Vol IX, pp 8-9). He had also been a member of a street gang when he used that nickname. (T, Vol IX, p 9; Vol X, p 120).

At the barber shop in September of 1998, Jerome Knight allegedly asked Coleman "to do a girl for him" for a G, i.e, $1,000, which Coleman took to mean to kill the girl or woman, but Knight did not identify her, and Coleman did not respond to the request. (T, Vol IX, p 12; Vol X, p 15). Mr. Coleman did not think the request was a serious one, so "I didn't pay it too much mind." (T, Vol IX, p 15). He did not know Yahnica Hill. (T, Vol IX, p 12).

Rodney Coleman went on to state that on October 13 Jerome Knight came to Coleman 's house and asked him to go to bond Gregory Rice out of jail. (T, Vol IX, pp 16-17). They went with Coleman's girlfriend, Marlynda Mattison, but were unable to get Rice out immediately because of an additional hold on him. (T, Vol IX, pp 18-19). Jerome Knight left them and picked up his girlfriend Nikki. After Mattison was unable to bond Rice out with the $700 given to her by Knight, Nikki gave them $72 from her purse. The two women went in and returned with Gregory Rice. (T, Vol IX, pp 21-23). Mr. Coleman said that until September of 1998 Gregory Rice lived with his grandmother but after that time Rice was homeless and would sleep in his car or at various people's houses, including Coleman's. (T, Vol IX, pp 24-25).

Mr. Coleman testified that in November Gregory Rice said "Something about he had killed

a girl." (T, Vol IX, p 27). "Well, he told me that he had came [sic] up upon a girl and shot her in her face, while she was inside her car.... On the east side." (T, Vol IX, p 29). He did not say how many times he shot her and did not name her, but said it was "J.J.'s [Jerome Knight's] baby's mother." (T, Vol IX, p 30; Vol X, p 34). However, Coleman had previously stated that Rice did not know who the person was. (T, Vol IX, p 35). Mr. Coleman said that Mr. Rice told him on the morning of the day the shooting happened, which was a couple of days before Thanksgiving, and Rice had told him about 9:00 that same morning. (T, Vol IX, pp 31-32). Rodney Coleman then told his aunt, Stephanie Harris, what Rice had said and then told the police investigator. (T, Vol IX, pp 33-36, 40-41; Vol X, pp 108, 128). Mr. Coleman admitted that when he was arrested in this case in February of 1999, "I was trying to get myself out of this situation" when he talked to the police. (T, Vol IX, p 54).

When the prosecutor rested both Jerome Knight and Gregory Rice moved for directed verdicts, which were denied. (T, Vol X, pp 138-144). Defense counsel for Mr. Rice argued that the case revolved around the testimony of Rodney Coleman and the motive evidence. (T, Vol X, p 138). He argued that it was improper to pile inference on inference and referred to *People v Atley*, 392 Mich 298 (1974). He noted that Stephanie Harris was "nothing more than a bolstering witness." (T, Vol X, p 140). Counsel for Jerome Knight argued, "there's nothing to connect the dots as far as this Defendant is concerned, because there is not one physical shred of evidence. Circumstantial evidence is just that he didn't like her, she didn't like him, and that's it. And threats alone are not enough." (T, Vol X, p 141).

In denying the motions for directed verdict, the trial said, "As to Defendant Rice, I do believe that it's hard to figure out where the witness Coleman is. But, I do believe that that's for the jury to

decide." (T, Vol X, p 142). Concerning Jerome Knight, she cited the evidence that Knight had asked Coleman to do a girl for a G and that Rice shot Yahnica Hill about six weeks after Knight bonded out Rice. (T, Vol X, p 143). She also stated, "[T]hose telephone threats and those voice mail threats along with the stormy relationship that seemed to have existed between him and Ms. Hill, his going to the jail to bond out Defendant Rice, could also cause a reasonable person to reasonably conclude that Defendant Knight hired Rice to kill Yahnica Hill." (T, Vol X, p 144).

Later, during the prosecution's closing argument but when the jury was not in the courtroom, the trial judge admitted, "This case was very close to a directive verdict, but for the things that I said when I made my ruling on the directive verdict." (T, Vol XII, p 30). After the closing arguments and instructions but before the jury began to deliberate, both defense counsel renewed their motions for directed verdict, and the motions were again denied. (T, Vol XII, pp 105-106).

Linda Hunter, the director of the Children's Palace Day Care Center, testified for the defense that Jerome Knight picked up his son, Jaylin Knight, at the center on Monday afternoon, November 23, i.e., the day the Hills called the police to claim Knight kidnapped Jaylin. Mr. Knight had his court papers showing that he was authorized to have custody. (T, Vol X, p 167).

Codefendant Gregory Rice testified that he knew Jerome Knight and they were friends because Knight was his barber. (T, Vol XI, pp 5, 18). Mr. Rice had lived with his grandmother off and on since he was about fifteen years old, and he denied that he was ever homeless or that he slept in his car. (T, Vol XI, pp 6-7). During the prosecutor's cross-examination Mr. Rice admitted that at the end of 1998 he had been unemployed, although he had a W2 form, Exhibit 205, that showed he earned over $2,000 for that year. (T, Vol XI, pp 29, 31).

When Rice was in jail he called several people in an attempt to bail him out, and none but

Jerome Knight responded. At Rice's instructions Knight found $630 that Rice had saved from work and hidden in his car and brought it to the jail for the bond. (T, Vol XI, pp 7-9). Mr. Rice also stated that Rodney Coleman had owed him about $260, but Coleman denied owing that much and did not repay Rice. (T, Vol XI, pp 10-11). Gregory Rice said that he had not known Yahnica Hill, had never been over to the Jefferson-Chalmers area on the east side of Detroit where she was killed, and had never told Rodney Coleman that he killed a girl on the east side. (T, Vol XI, p 14).

Several witnesses testified for the defense that Yahnica Hill had many times refused to allow Jerome Knight to have his visitation with Jaylin that was ordered for every Sunday through Tuesday. These witnesses included Jania Knight, his sister, who had also known Yahnica Hill from the two women working together, and who was listed in the visitation order as the one to transfer Jaylin between Ms. Hill and Mr. Knight. When Ms. Hill refused to give Jaylin to Jania Knight for the court-ordered visitation, Jerome and Jania Knight regularly called the police and filed a complaint against Hill for violating the order, as Mr. Knight's lawyer had instructed him to do. (T, Vol XI, pp 45-51, 53-56, 63, 67, 70, 73-76). Jania and Jerome Knight went to the police station seven separate times to report violations. (T, Vol XI, pp 63, 76-77).

Defendant Jerome Knight testified in his own defense and denied killing or injuring Yahnica Hill. (T, Vol XII, p 26). He acknowledged that Yahnica Hill had obtained a PPO against him: the PPO was issued ex parte on July 12, 1998, he filed a response, and then the PPO was dismissed at the court hearing on July 30. (T, Vol XII, pp 4-8). Ms. Hill also had an order for child support against Mr. Knight, which he paid through wage assignment. (T, Vol XII, pp 8, 15). Although he had the court order for visitation from Sunday afternoon to Tuesday afternoon of every week, Hill denied him visitation, and he and his sister would go to the police station to file a complaint, as his

lawyer had instructed. (T, Vol XII, pp 11-12, 17-20). When she did not give him visitation on Sunday, November 22, Jaylin's birthday, Mr. Knight went to the day-care center on Monday afternoon, showed his order to the staff, and took Jaylin home. Yahnica Hill came to his house that evening and was very upset. (T, Vol XII, pp 20-24, 54-56, 70).

Mr. Knight acknowledged that he knew Gregory Rice from Rice being a customer at the barber shop. Mr. Rice contacted Mr. Knight for help getting out of jail, and Knight went to the jail with Rodney Coleman, Coleman's girlfriend, and Knight's girlfriend. Because Rice did not have the full amount, only the $630 that Knight found hidden in Rice's car, Knight's girlfriend had to loan part of the money, which was later paid back. (T, Vol XII, pp 47-50, 68).

During her closing argument the prosecutor alleged that Gregory Rice had a motive to do the shooting at Jerome Knight's behest because Rice was poor and needed the money. (T, Vol XIII, pp 21-23, 32). The trial judge overruled defense objections to this argument that the prosecutor could rely on poverty to bolster her allegations.

The jury found Jerome Knight guilty as charged of first-degree premeditated murder and found Gregory Rice guilty as charged of premeditated murder and felony-firearm (T, Vol XIV, p 4), and on September 17, 1999, Jerome Knight and Gregory Rice were both sentenced to the mandatory term of life in prison without parole for the murder count, and Mr. Rice was sentenced to the mandatory consecutive term of two years in prison for felony-firearm.

Defendant appealed to the Court of Appeals by right. In an Unpublished *per curiam* Opinion dated October 15, 2002, the Court of Appeals affirmed the Defendant's conviction. This Court issued an Order vacating the portion of the judgment of the Court of Appeals concerning defendant's peremptory challenge issue under *Batson v Kentucky*, 476 US 79, 106 S Ct 1712, 90 L Ed 2d 69

(1986) and remanded the matter to the Court of Appeals for reconsideration of that issue.

On October 7, 2003, the Court of Appeals again affirmed the Defendant's conviction in an Unpublished *per curiam* Opinion. Accordingly, Defendant is again appealing to this Court and asking this Court to grant Leave to Appeal and reverse the judgment of the Court of Appeals, or to peremptorily reverse the judgment of the Court of Appeals.

ARGUMENT

THE COURT OF APPEALS MISAPPLIED THE RECORD AND THE LAW WHEN IT HELD THAT THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING A *BATSON* VIOLATION BASED ON THE PROSECUTOR'S FAILURE TO GIVE SUFFICIENT "RACE NEUTRAL" REASONS FOR EXCLUDING TWO OF THE MINORITY JURORS FROM THE JURY PANEL WITH PEREMPTORY CHALLENGES.

During voir dire, the prosecutor initially dismissed one male and two female African-American jurors on Mr. Knight's jury (T, Vol I, p 113; Vol II, p 78; Vol III, p 52). Defense counsel argued that the exercise of peremptory challenges of the three jurors raised an inference of purposeful discrimination (T, Vol III, pp 53-54). The prosecutor gave the following reasons for excusing the jurors: as to juror Ms. Blackmon, because she was familiar with the judge and because she worked with jailers through the PA 511 program; as to juror Ms. Sanderson, because she had a "bad experience" with the justice system; and as to juror Mr. White, because he had a relative that had been convicted of a rape charge (T, Vol III, pp 56-57). The Court ruled that the reasons were sufficient to withstand a *Batson*[2] challenge (T, Vol III, p 58).

The defense then objected to the government's peremptory challenges to African American jurors Johnson, Bonner, and Jones (T, Vol III, p 86). The prosecutor responded that she excluded juror Bonner because she was related to two people that were convicted of first degree murder (T, Vol III, pp 86-87). However, she gave the following reasons for striking jurors Johnson and Jones:

> [THE PROSECUTOR]: Miss Johnson indicated that -- looking at her body language when she was seated and the tone of her voice and the look that she gave when she indicated that she could be fair; she was hesitant in her demeanor. And she also indicated that she had a close relative that was convicted of a drug charge. And

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2 *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).

> although she indicated that she could be fair, she was very reticent in terms of her demeanor.
>
> Miss Jones, the person that was last dismissed, is a person that has a child that's close in the age to the victim in this case. She's a person that is a working person that is in some type of professional position at Blue Cross.
>
> * * *
>
> And Miss Jones is not similarly situated as our victim. She has a daughter that may be different from our victim. And she may view the life style of this victim and compare and contrast that with her own child. I don't think that that should enter into it. She indicated that she could be fair.
>
> But the reason that she was stricken is because this young woman whose life-style in this case may be significantly different from the background she is from. So therefore she was stricken.

(T, Vol III, pp 87-88).

At this point, the Court indicated that there were only ". . . two or three minority jurors left on [the] panel . . ." and that they were ". . . getting close to a sensitive issue." (T, Vol III, pp 88-89). The Court further indicated she should have required that they remain on the jury (T, Vol III, pp 89-90). At that point, the deputies attempted to bring juror Jones back in the courtroom, but discovered that she had already left (T, Vol III pp 91-92). Defense counsel also argued that because the criminal justice juror pool system was not racially neutral since the jury pool was made up of more than 80% white jurors (T, Vol III, p 95).

Although the prosecutor indicated that the defense had excluded white jurors, the trial court judge clearly indicated that the prosecutor's reasons for excluding jurors Jones and Johnson were not race neutral reasons:

> THE COURT: We have to be realistic here. I really don't want any problems with this case, especially along these lines.
>
> ***I'm not satisfied with the prosecutor's response as to***

potential juror Jones and Johnson. But I think they've already left.

* * *

> I'm just saying, I let Jones and Johnson go without holding them, especially Jones. I guess I should have held her and I didn't do that. I'll take the fault for that. But from this point on let's try to be careful with this jury selection.

(T, Vol III, pp 95-96)(emphasis added).

The Court ultimately overruled the *Batson* challenge, noting that two black women were on the jury (T, Vol III, p 131). The Court of Appeals agreed that the trial court did not abuse its discretion in rejecting the discriminatory nature of the prosecutor's peremptory challenges of six prospective jurors, and affirmed in an Unpublished *per curiam* Opinion dated October 15, 2002. Defendant appealed to this Court and asked this Court to grant Leave to Appeal. On appeal, this Court issued the following Order:

> Delayed application for leave to appeal the October 15, 2002 judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(F)(1), in lieu of granting leave to appeal, we VACATE the portion of the judgment of the Court of Appeals concerning defendant's peremptory challenge issue under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L. Ed.2d 69 (1986) and REMAND for reconsideration of that issue.
>
> Trial transcript indicates that the trial judge was not satisfied with the prosecutor's race neutral reasons for peremptorily dismissing several jurors. Tr. at 95. Court of Appeals based its judgment on the premise that the trial court rejected the Batson challenge and, in doing so, the Court of Appeals also appears to have failed to follow *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (holding that evaluation of the prosecutor's state of mind based on demeanor and credibility lies peculiarly within the trial judge's province). We remand to the Court of Appeals for reconsideration of whether the trial judge erred in finding a *Batson* violation. If the Court finds that the trial court did not err, the Court shall address whether the trial court was correct in ruling that the racial composition of the final jury cured any *Batson* violation that

was not cured due to the failure to reseat the peremptorily dismissed jurors.

(Order of the Supreme Court, Docket No. 122852).

On remand, the the Court of Appeals again affirmed the Defendant's conviction in an Unpublished *per curiam* Opinion:

> We have reviewed the transcript reference cited by the Supreme Court, which shows, according to the Supreme Court, that the trial judge was not satisfied with the prosecutor's race neutral reasons for peremptorily dismissing "several" jurors. The transcript reveals that the trial court was not satisfied with the prosecutor's reasons with respect to two prospective jurors, venirepersons number 2 and 9. In regard to venireperson # 9, there was never an objection by defense counsel when the prosecutor exercised her peremptory challenge, and venireperson # 9 left the courtroom. In regard to venireperson # 2, defense counsel did raise a *Batson* challenge immediately upon the prosecutor's exercise of a peremptory challenge. The jury pool was taken out of the courtroom while the parties addressed the *Batson* challenge. During this time period, venireperson # 2, apparently under the belief that she had definitively been discharged, left the building. While the trial court was dealing with the issue and arguments concerning venireperson # 2, it also stated that it had been concerned about the prosecutor's peremptory challenge of venireperson # 9; however, the court did not say anything at the time of the challenge because there had been no objection. The prosecutor proceeded to give a reason for discharging venireperson # 9. The trial court was not satisfied with the prosecutor's claimed race-neutral explanations as to both prospective jurors, but the court noted that they had already left the building. The trial court indicated that it should have held the two prospective jurors. However, the court also stated that it did not think the problem was serious enough at that point in the proceedings. We note that the trial court did not make a specific finding that the prosecutor had engaged in purposeful discrimination. In fact, at the end of jury selection, the trial court stated that "I don't think either side ended up selecting this panel for any reason other than I think that these are the ones who will be the fair and impartial persons to hear and try this case." The trial court also indicated that "any *Batson* problems that may have" occurred were cured in light of the ultimate racial composition of the jury. The trial court noted that "[w]e have the same number if not more jurors, African American female jurors[,]

on the panel as if we had kept [the two prospective jurors]."

* * *

Our Supreme Court has ordered us to reconsider "whether the trial judge erred in finding a *Batson* violation." We are somewhat puzzled by this language in that, as noted above, there was no specific finding of a *Batson* violation. Because the two prospective jurors had already left the courthouse, the trial court apparently found no reason to directly address whether there was purposeful discrimination. Nonetheless, we shall endeavor to follow the Supreme Court's order as written. As such, we are required to begin with the assumption that the trial court found a *Batson* violation, and arguably, a finding of purposeful discrimination is implicit in the trial court's indication of its dissatisfaction with the prosecutor's race-neutral explanations.

An appellate court must give great deference to the trial court's findings on a *Batson* issue because they turn in large part on credibility. *Harville v State Plumbing & Heating, Inc*, 218 Mich.App 302, 319-320; 553 NW2d 377 (1996). The decision on the ultimate question of discriminatory intent represents a finding of fact accorded great deference on appeal, which will not be overturned unless clearly erroneous. *Miller-El v. Cockrell*, 537 U.S. 322; 123 S Ct 1029; 154 L.Ed.2d 931, 951-952 (2003). Nonetheless, we find that the trial court clearly erred and abused its discretion in finding a *Batson* violation. Assuming that defendant made a prima facie showing that the peremptory challenges had been exercised on the basis of race, and after the prosecutor proffered race-neutral explanations, the trial court was required to determine whether defendant had shown purposeful discrimination. *Miller-El, supra*. We must accept the trial court's rejection of the prosecutor's race-neutral explanations as a finding of purposeful discrimination. However, that implicit finding of purposeful discrimination directly conflicts with the trial court's belief, clearly stated on the record, that the attorneys for all parties selected a jury motivated solely by the desire to have fair and impartial persons hear the case. The trial court's own language cannot support a finding of purposeful discrimination. Moreover, there were valid race-neutral reasons articulated by the prosecutor justifying the peremptory challenges of venirepersons # 2 and # 9. Venireperson # 9 was very familiar with the circumstances surrounding a first cousin's arrest and conviction on a drug charge, and venireperson # 2 "hoped" she would not compare the victim to her own daughter who was about the same age as the victim. See *People v. Howard*, 226 Mich.App 528, 534-535; 575 NW2d 16 (1997)(criminal conviction of a close relative,

> an uncle, was a proper race-neutral reason for peremptory challenge; life circumstances of venireperson comparable to the particular factual circumstances found in the criminal case can justify a peremptory challenge). Therefore, although we give great deference to the trial court's findings on a *Batson* issue, the record does not support a conclusion of purposeful discrimination, and the court erred in finding a *Batson* violation.

(Slip Op at 2-3).

The prosecutor violated the Equal Protection Clause by exercising peremptory challenges to exclude potential jurors on the basis of gender and race. US Const Am XIV; *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). A defendant establishes a prima facie case of a racially discriminatory jury selection where he demonstrates (1) that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of his race, and (2) the circumstances of his case raise an inference that the prosecutor used the jury selection process to exclude venire persons from the jury based on race. *Batson, supra* at 96. A single racially-based peremptory challenge is sufficient to constitute purposeful racial discrimination in the jury selection. *Batson, supra* at 95.

Once a defendant makes a *prima facie* showing of purposeful discrimination in selection of the jury, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. The prosecutor may not rebut the defendant's *prima facie* case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption where his intuitive judgment, that they would be partial to the defendant because of their shared race; but rather, must articulate a neutral explanation related to the particular case to be tried. *Batson, supra* at 97. The trial court then has the duty to determine whether the defendant has established purposeful discrimination. *Batson, supra* at 98.

First, the defendant must establish a *prima facie* case of a racially discriminatory jury selection. This can be shown where the circumstances of his case raise an inference that the prosecutor used the jury selection process to exclude venirepersons from the jury based on race. *Batson, supra* at 98.

In *Powers v Ohio,* 499 US 400, 410; 111 S Ct 1364; 113 L Ed 2d 411 (1991), the Court held that a criminal defendant could object to race-based exclusions of jurors through peremptory challenges whether or not the defendant and the excluded jurors shared the same race. A defendant may establish a prima facie case based solely on the prosecutor's exercise of peremptory challenges at the defendant's trial. *Batson, supra* at 87; *Georgia v McCollum*, 505 US 42, 47; 112 S Ct 2348; 120 L Ed 2d 33 (1992). A single race-based peremptory challenge is sufficient to constitute purposeful racial discrimination in the jury selection. *Batson, supra* at 95.

Second, once the defendant makes a *prima facie* showing, the burden shifts to the state to come forward with a race-neutral explanation for challenging a minority juror. *Batson, supra* at 97. Third and finally, if the prosecution tenders a race-neutral explanation, the trial court then has the duty to determine whether that explanation is pretextual. *Batson, supra* at 96-98; see also *Purkett v Elem*, 514 US 765; 115 S Ct 1769, 1771; 131 L Ed 2d 834 (1995).

The prosecutor in the case at bar improperly exercised peremptory challenges to exclude three black women, in violation of *Batson v Kentucky, supra.* It is clear that Mr. Knight established a *prima facie* case of racial discrimination in the prosecutor's peremptory challenges of the black jurors. Mr. Knight is black, and thus, a member of a cognizable racial group. The prosecutor used peremptory challenges to exclude three jurors who were black, and consequently, members of Mr. Knight's race. Since the Court ruled on the prosecutor's explanation, the requirement that the

defendant make a *prima facie* showing of race-based peremptory challenges becomes moot. *United States v Gibbs*, 182 F3d 408, 438-439 (CA6, 1999).

All the excused jurors indicated that they could be fair. The prosecutor's reasons for excluding the jurors are highly suspect. These facts suggest that the prosecutor intentionally used her peremptory challenges to exclude several jurors based on their race. The prosecutor's reasons for excluding the jurors did not constitute sufficient "neutral explanation[s] for challenging" the black jurors, and the Court so ruled in this case.

The prosecution's explanations for seeking to exclude the jurors confirmed rather than disavowed the racial basis of the exclusion. According to the prosecutor, she excused two of the jurors, in part because they had relatives in the criminal justice system. On its face, this reasoning is based upon race. It is impossible to fairly characterize the prosecutor's explicit racial reference as setting forth a race-neutral reason for exercising the peremptory. The basis for the exclusion indisputably pertained to race, and was therefore, per force, not race-neutral. Under *Batson*, that is the end of the inquiry and a new trial is required. See *Purkett v Elem, supra*, 115 S Ct at 1770-1771 (indicating that the inquiry proceeds to the third step only "[i]f a race-neutral explanation is tendered").

As to the prosecutor's exclusion of jurors who had relatives with criminal records, this created a disparate impact on the composition of the jury. As the Sixth Circuit Court of Appeals recognized in *United States v Brown*, 182 F3d 919 (Unpublished, CA6, 1999), "the potential impact of the prosecutor's grounds [excusing a juror who had a family member in prison] for this strike is disturbing, as disparate impact alone does not establish a violation of the Equal Protection Clause. In *Brown*, the Court did not reverse because the prospective juror stated that she would have some

difficulty being impartial and the Court could not say that the district court was clearly erroneous in its finding that the prosecutor lacked the necessary discriminatory intent.

In addition to relying upon an improper race-related basis for exercising a peremptory, the prosecutor in this case also explicitly based the peremptory challenge upon unconstitutional gender-related stereotypes. In *J.E.B. v Alabama ex rel T.B.*, 511 US 127, 138; 114 S Ct 1419; 128 L Ed 2d 89 (1994), the Supreme Court disparaged this very reasoning when it rejected respondent's argument that women might be more sympathetic and receptive to the arguments of the complaining witness, who was a mother. "We shall not accept as a defense to gender-based peremptory challenges 'the very stereotype the law condemns.'" *J.E.B.*, 511 US at 138, (citing *Powers v Ohio, supra*, 499 US at 410).

In the instant case, the prosecutor claimed that Ms. Johnson was "opinionated" based on her "body language" -- although she had expressed no opinions whatsoever. Neither the prosecutor's claimed good faith, nor her gender and race stereotypes, constitute acceptable reasons for the exercise of her discriminatory challenges. *Gibbs, supra* at 440.

The prosecutor's rationale thus rests on forbidden considerations of gender as well as race. In *J.E.B.*, the case in which the U.S. Supreme Court extended the protections of *Batson v Kentucky* to gender-based peremptory challenges, the Court recognized the "temptation to use gender as a pretext for racial discrimination," and noted that a majority of lower court decisions extending *Batson* to gender prior to the *J.E.B.* decision involved the use of peremptory challenges to remove minority women. *J.E.B.*, 511 US at 145. The Court stated:

> Failing to provide jurors the same protection against gender discrimination as race discrimination could frustrate the purpose of *Batson* itself. Because gender and race are overlapping categories,

> gender can be used as a pretext for racial discrimination. Allowing parties to remove racial minorities from the jury not because of their race, but because of their gender, contravenes well-established equal protection principles and could insulate effectively racial discrimination from judicial scrutiny.

J.E.B., 511 US at 145.

Even if, contrary to logic and to the very explicit language used by the prosecutor, this Court were to determine that the prosecutor's reason for excluding the jurors was not, on its face, based upon race or gender, it is beyond serious question that the reason offered was, in any event, pretextual. First and most fundamentally, the prosecutor's purported fear of Ms. Johnson's "mind set" was utterly baseless under the circumstances of this case. In other words, the prosecutor's justification for the peremptory challenge was inherently race-based as well as gender-based; even if it were deemed to be neutral, the explanation is patently pretextual.[3]

This Court in its remand order first asked the Court of Appeals to determine " . . . whether the trial judge erred in finding a *Batson* violation." Contrary to the Court of Appeals' holding on this issue, on the basis of the prosecutor's borderline pathetic "reasons" as to why she excused the jurors in question, it is clear that the finding of the *Batson* violation is aptly supported.

The tougher question was, as this Court put it, whether ". . . the trial court was correct in ruling that the racial composition of the final jury cured any *Batson* violation that was not cured due to the failure to reseat the peremptorily dismissed jurors."[4] Although it appears from the record that

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[3] While the Court of Appeals noted that in resolving a claim of purposeful discrimination, a court must determine whether the prosecutor's race-neutral explanation was merely a pretext, (Slip Op at 3, n. 3), there is no indication in the Opinion that the Court of Appeals ever determined whether this was the case.

[4] The Court of Appeals also failed to address this question.

there were a couple of other black persons in the jury, it is the fact that the prosecutor dismissed the several black jurors from a panel comprised of less than 20% black people that raises due process concerns. "The exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system." *J.E.B.*, 511 US at 142, n 13. Moreover, the Sixth Circuit Court of Appeals directly addressed this question and held that the mere fact that some minority jurors were ultimately seated on the jury or were available as alternates in no way mitigates the harm, as this is a structural error which is not subject to a harmless error analysis. *United States v Harris*, 192 F3d 580, 588 (CA6, 1999); *United States v McFerron*, 163 F3d 952, 955-956 (CA6, 1998). In this regard, the majority in *United States v Harris* noted as follows:

> The only other factor mentioned by the district court was its observation that the two venire panelists who were struck would only have served as alternates even if they had not been struck by the prosecutor. The logic of this statement escapes us as it is clear that the district court, at the time it made its ruling, could not possibly have known whether any of the alternates would be called to serve on the petit jury. Moreover, the harm inherent in a discriminatorily chosen jury inures not only to the defendant, but also to the jurors not selected because of their race, and to the integrity of the judicial system as a whole. [Citation omitted]. This principle is equally applicable to the selection of alternate jurors. Thus, we hold this factor of alternate status to be irrelevant, leaving the selection of one African- American for the jury as the only articulated reason for the district judge's conclusion denying the *Batson* challenge.
>
> The government, having the benefit of hindsight, argues that any error made by the district court in this respect must be deemed harmless, as none of the alternate jurors were ever called upon to deliberate in this case. The government's position is without support.
>
> ***This type of error involves a "structural error," which is not subject to harmless error analysis.***
>
> * * *

> A panel of this court applied this principle in *United States v McFerron*, 163 F3d 952, 956 (6th Cir. 1998), where it held that the erroneous denial of a peremptory challenge constituted "structural error" under the *Fulminante* analysis. And while the instant case involves the allegedly erroneous grant of a peremptory challenge rather than the erroneous denial of a peremptory challenge, we make no distinction between the two cases, as the underlying rationale is the same. ***Because the process of jury selection--even the selection of alternate jurors-- is one that affects the entire conduct of the trial, the district court's decision with respect to the peremptory challenges of the alternate jurors is not subject to harmless error review.***
>
> In sum, the district court's terse analysis of the Batson challenge leaves us with little to review. It seems to have made no effort to weigh the credibility of the prosecutor's asserted reasons for striking the panelists, relying instead on impermissible factors in reaching its conclusion.

United States v Harris, supra at 587-588 (emphasis added), citing, *Arizona v Fulminante*, 499 US 279; 111 S Ct 1246; 113 LEd2d 302 (1991).

The trial court's ruling permitting the exclusion of the jurors from the jury violated Mr. Knight's constitutional right to the equal protection of the laws. This Court must reverse Mr. Knight's conviction and remand this case for a new trial which is conducted with fair jury selection procedures.

RELIEF REQUESTED

WHEREFORE Defendant-Appellant respectfully requests this Honorable Court to grant leave to appeal, or other appropriate peremptory relief.

Respectfully submitted,

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Dated: November 10, 2003.

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court No.
Court of Appeals No. 231845
Lower Court No. 99-2073-02

v

JEROME KNIGHT,

Defendant-Appellant.
_____/

PROOF OF SERVICE

STATE OF MICHIGAN)
)ss.
COUNTY OF WAYNE)

Gerald M. Lorence, being first duly sworn, deposes and says that on this 10th day of November, 2003, he did serve a copy of Defendant-Appellant's Application for Leave, along with this Proof of Service upon:

Wayne County Prosecutor's Office
Frank Murphy Hall of Justice
Appellate Division
1441 St. Antoine - 12th Floor
Detroit, Michigan 48226

by enclosing the same in a properly addressed envelope, with first-class postage affixed thereon, and depositing said envelope in a United States Mail receptacle.

GERALD M. LORENCE

Subscribed and sworn to before me
this 10th day of November, 2003.

Notary Public

DORIS G. JONES
NOTARY PUBLIC WAYNE CO., MI
MY COMMISSION EXPIRES Nov 7, 2009